APPEAL NO. 92122

On February 26, 1992, a contested case hearing was held in _____, Texas, presided over by (hearing officer). He decided against appellant on the two disputed issues, namely, whether appellant's left wrist carpal tunnel syndrome arose out of and in the course and scope of employment, and, whether respondent timely contested the compensability of appellant's injury pursuant to the provisions of the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-5.21 (Vernon Supp. 1992) (1989 Act). Appellant challenges the sufficiency of the evidence to support the hearing officer's determination that his carpal tunnel syndrome was not compensable contending that respondent's medical reports were provided by doctors who never visited the job site to observe the repetitiveness of appellant's duties. Appellant also contends that respondent, after receiving written notice of appellant's injury, failed to either begin the payment of benefits or to notify appellant and the Texas Workers' Compensation Commission (Commission) of its refusal to pay. Although respondent did contest the compensability of the injury within 60 days, appellant argues that because respondent did not initiate benefit payments not later than the seventh day, its controversion was untimely. Respondent, on the other hand, urges that the expert medical opinions outweigh appellant's lay opinion on the causation of carpal tunnel syndrome. As for the timely contest issue, respondent posits that Article 8308-5.21 (1989 Act) gave respondent 60 days to contest the compensability of appellant's injury and that the 60-day period is not limited by the companion provision in Article 8308-5.21 requiring a carrier to either begin payments of compensation or provide written notice of its refusal not later than the seventh day after receiving written notice of the injury.

DECISION

Finding the evidence sufficient to support the hearing officer's determination that appellant's carpal tunnel syndrome was not compensable and finding no error in his determination that respondent timely contested the compensability of appellant's injury, we affirm.

The hearing officer stated the above-mentioned as the two disputed issues and the parties agreed those were the issues. Respondent, however, objected to the hearing officer even considering the timely contest issue on the theory that respondent's failure to either initiate the payment of compensation or notify the Commission and appellant of its refusal to pay not later than the seventh day after receiving written notice of injury was a matter for the consideration of the Commission's Compliance and Practice Division. Respondent urged that the hearing officer lacked jurisdiction over such issue and that the conceded failure of respondent to issue written notice of denial by the seventh day be dealt with by the Commission as a matter for possible administrative penalties. The hearing officer reserved his ruling on this objection and took the parties' evidence on both issues. After hearing the testimony of appellant, the sole witness, and receiving the parties' documentary evidence without objection, the hearing officer heard their closing statements

and closed the hearing. He subsequently concluded that appellant had not sustained a compensable injury for which respondent was liable for the payment of compensation and, that respondent did contest the compensability of appellant's injury within 60 days of receiving written notice of the injury and thus did not waive its right to contest its liability for payment of benefits under the 1989 Act.

Appellant, age 44, testified he had worked for (Employer) for 20 years and had been a pipefitter since 1974. For the past 14 years he had been a safety valve repairman which required him to use his hands and wrists in the process of disassembling, refurbishing, and reassembling the safety valves. It takes appellant approximately one hour to overhaul a safety valve. He uses an impact hammer to break loose the valve pieces and then uses wrenches to take the components apart. Once he has completed the chipping, sandblasting, and painting of the components, he reassembles the valves using wrenches. He raises and lowers the valves to his work station with a chain hoist. He said that most of the twisting motions or turns he performs with wrenches involve one-fourth to one-half turns or rotations around the circumference of the components and that he uses his hands and fingers to twist parts already loosened with hammers and wrenches. "Some other person" counted approximately 300 twists in the process of disassembling a safety valve. Since appellant worked on an average of five valves per day, he estimated he would perform approximately 600 twisting motions per valve and approximately 1500 such motions per day. He viewed such motions as repetitive motions and his use of the impact hammer as the use of a vibrating tool. Appellant is right-handed, but uses his left hand when his right hand gives out.

Appellant went to Employer's first aid office during a work day in November 1990 with complaints about his shoulders and also complained of tingling and numbness in his left wrist. He said he told Employer before January 1991 that he regarded his wrist problem as work related because of the nature of his work and the fact that he didn't engage in any activities off the job that he felt would cause the condition. According to the report of Dr. B, Employer's Senior Occupational Physician, dated June 18, 1991, appellant's first complaint of left wrist and hand pain was made to Dr. B's department on November 30, 1990. Appellant didn't disagree with that date. He said he also told his foreman about his hand problem the next day or so after November 30, 1990.

Dr. B's report indicated appellant had been seen "on multiple occasions for a variety of musculoskeletal complaints and symptoms including neck pain, bilateral shoulder pain, low back pain, muscle spasms, and most recently left hand problems. He has been evaluated by a number of physicians in the department and had been referred to a number of consultants for diagnostic, therapeutic, and rehabilitative purposes." When seen on November 30, 1990, the date he first voiced left wrist and hand complaints, appellant did not provide a history of incident or injury. He was treated conservatively for "a presumed ulnar neuritis" until December 18, 1990, at which time his continued complaints led to electrodiagnostic testing on January 9, 1991. The EMG of appellant's upper left extremity

was normal; however, the nerve conduction testing "was suggestive of carpal tunnel syndrome [CTS] and a possible ulnar neuropathy." On February 12, 1991, Dr. B referred appellant to Dr. U, a hand surgeon, for consultation indicating appellant "complained of bilateral shoulder pains after pulling and lifting" and that his "symptoms have metamorphosed into complaints of tingling and numbness in his left hand and wrist." Dr. B's consultation request indicated a diagnosis of "probable left carpal tunnel syndrome" refractive to conservative treatment and a treatment plan which included no work with left hand for two months, medications, and a wrist splint.
Dr. U's report of March 5, 1991, stated he found a subsiding compression syndrome of the left median and ulnar nerves and a subsiding synovitis of two left hand joints. He recommended the continuation of the left wrist splint and the work restriction for another month." On April 1, 1991, Dr. B released appellant for regular duty with no restrictions.

According to appellant, at some later time Dr. B recommended appellant see another doctor and told him to contact respondent. Appellant then called respondent's representative, Ms. G, who arranged for appellant to see Dr. K, a hand surgeon. Appellant was examined by Dr. K on (date of injury). Dr. K's report of (date of injury) noted that appellant was right handed, reported no trauma, and was a pipefitter who "lifts valves, works on wrenches and pulls chains. He does not operate any vibrating tools and he does nothing in a repetitive fashion." Dr. K's report stated that appellant's nerve conduction study in January 1991 was compatible with CTS, recommended another nerve conduction test, and suggested appellant undergo a carpal tunnel release. As for the cause of appellant's apparent CTS, Dr. K stated that CTS "is a very frequently seen problem and has been related to certain job activities requiring frequent repetitive finger motion, assembly line type of work or the operation of vibrating tools. None of these fit in his job description." Appellant stated he believes Dr. K to be a good doctor and said he has faith in Dr. K. A second report from Dr. K indicated he reexamined appellant on July 23, 1991, and that a nerve conduction study did indicate CTS. Dr. K suggested surgery on the nerve and appellant concurred. Apparently appellant did have the surgery on or about July 30th. At the time of the hearing he said he was back on the job and that his wrist was fine. He testified that 80% of his gross salary and his medical bills had been paid for, apparently by employer's group carriers. The medical records of the surgery were not introduced.

Though one of the reasons stated by respondent for contesting payment of benefits was the contention that appellant's date of injury was November 30, 1990, the timeliness of appellant's notice of injury was not a disputed issue. On August 19, 1991, appellant signed an "Employee's Notice of Injury or Occupational Disease and Claim for Compensation" (TWCC-41) which stated his date of injury as "(date of injury)," the date of his first visit to Dr. K, and that his accident involved his "left hand" from "repetitive work." Appellant testified that he had thought all along that his left wrist problem was work related but became convinced of it after his first visit to Dr. K on (date of injury). He said he didn't complete the TWCC-41 until August 19th, however, and that he talks to his union steward before he does his paperwork. There was no evidence as to the disposition of the TWCC-41 after appellant signed it on August 19th. Article 8308-5.01(a) provides that "[i]f an injury is an occupational

disease, the employee or person [acting on the employee's behalf] shall notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment." Article 8308-5.01(c) provides that such notice may be given to the employer or to any employee who holds a supervisory or management position of the employer. Article 8308-1.03(36) defines "occupational disease" as including "repetitive trauma injuries." Dr. K's report of (date of injury) stated that if the January 1991 nerve conduction test results "are valid and still reliable it seems as though he has carpal tunnel syndrome." This report stated that Dr. K suggested carpal tunnel release surgery after first obtaining a new nerve conduction study to check on any change and that "I did outline that all to him." Appellant himself testified that while he had thought all along he had job-related CTS, he hadn't been diagnosed as having it and that he became "aware" and convinced he had work-related CTS after the (date of injury) visit to Dr. K. This being the case, appellant's 30-day period to report his occupational disease to Employer commenced on July 18th, a Thursday, and expired on August 16th, a Friday. Appellant's TWCC-41 was dated August 19th and therefore was not timely even assuming, without knowing, that the TWCC-41 or some other form of notice of injury was provided to Employer on August 19th. Article 8308-5.02 provides that an employee's failure to notify the employer as required by Article 8308-5.01(a) relieves the employer and the employer's insurance carrier of liability under the 1989 Act unless the employer or the carrier has actual knowledge of the injury, the Commission determines that good cause exists for failure to give timely notice, or the employer or carrier doesn't contest the claim. Appellant did not assert or articulate below that he recognized that his notice of injury was

not timely and that he was relying on theories of "actual knowledge" and/or "good cause" to maintain respondent's liability.

Article 8308-5.05(a) provides that if an employee notifies the employer of an occupational disease pursuant to Article 8308-5.01(a), the employer shall file a written report with the Commission and the carrier and must mail or deliver such report not later than the eighth day after the employee's absence from work for one day due to an injury, or, after the employer receives notice pursuant to Article 8308-5.01(a) that the employee has contracted an occupational disease. Appellant adduced no evidence of his having provided notice to Employer of his CTS, after becoming convinced it was work related on (date of injury), aside from the untimely TWCC-41 the disposition of which was not established by appellant.

The next piece of evidence in this chronology was "Standard Form for Employer's First Report of Injury or Illness" (Employer's First Report), apparently a form promulgated by the Commission's predecessor agency (Industrial Accident Board), dated "11-26-91," which showed appellant's date of injury as "11-30-90." This document stated that the injury or illness was "carpal tunnel syndrome, left wrist;" that Dr. K was the physician; that appellant returned to work on "09-16-91;" and, that the manner in which the accident occurred was "unknown." While this document contained no answer to item 9 ("when did you or foreman first know of injury?"), it did state in item 7 that the first day appellant was "unable to labor" was "07-30-91." We observed above that Article 8308-5.05(a) provides an employer with

eight days to file a written report with the Commission and its carrier after the employee's absence from work for one day due to an injury. It appears from the evidence, albeit sketchy, that Employer treated appellant's CTS surgery as an ordinary disease of life for which employer's group insurance carriers made disability payments and paid appellant's medical bills.

At this point in the chronology we surmise that, sometime after appellant's second visit to Dr. K on July 23rd when Dr. K confirmed the CTS diagnosis based on a recent nerve conduction study, appellant underwent surgery on his left wrist. Employer's First Report stated that appellant was unable to labor as of "07-30-91" and returned to work on "09-16-91." Prior to the preparation of the Employer's First report on "11-26-91," appellant returned to Dr. K in November 1991 to specifically discuss the causation of his CTS. Appellant said he asked Dr. K to reconsider his opinion on causation based on information about appellant's job duties. Appellant testified that he described to Dr. K his job duties as a safety valve repairman including the twisting of valve parts, the pulling on the chain hoist, and the use of an impact gun to break the valve parts loose. He said he even took off his cap and showed Dr. K a depiction on the cap of a safety valve and explained to Dr. K what he does to a safety valve. Dr. K's (date of injury) report had stated that appellant's job description didn't require the "frequent repetitive finger motion, assembly line type of work or the operation of vibrating tools" related to CTS. However, according to appellant, Dr. K wouldn't change his opinion after again talking to appellant. Dr. K's report of November 4, 1991, was addressed to Employer to the attention of Mr. B. Appellant's representative at the contested case hearing was Mr. B, the business manager of the (Union). Dr. K stated in that report that appellant has asked him to respond to Mr. B "regarding the question as to whether or not his carpal tunnel is work related." Dr. K went on to state that "[T]here are certain job activities that have become accepted as functions that will instigate symptoms of carpal tunnel syndrome and those individuals that are predisposed to having it. His particular job activity in my opinion does not fall into that realm. He and I discussed that prior to his surgery and it is indeed my opinion."

The final document in the chronology of the evidence was a "Payment of Compensation or Notice of Refused/Disputed Claim" (TWCC-21) dated "12-9-91." This document stated appellant's date of injury as "11/30/90" and showed appellant's injury as "carpal tunnel - left wrist." It stated that respondent's first written notice of appellant's injury was received on "11/21/91," notwithstanding that Employer's First Notice was dated "11-26-91." Respondent's TWCC-21 form contained the following reasons for refusing or disputing payment to appellant:

"This claim is being controverted based on the following:

1.The correct alleged date of injury should be 11/30/90 when claimant first reported wrist pain to Dow which he felt may be related to his work.

2.Per [Dr. K's] reports attached, claimant's carpal tunnel is not job related."

In his argument to the hearing officer appellant sought to impeach Dr. K's opinions on the theory that while Dr. K "is one of the best" on CTS, he didn't really appreciate all the repetitive motion involved in appellant's job. Appellant asserts in his appeal that "this issue is not a medical question to be answered by doctors who have never visited his job site to observe the repetitiveness of his duties." On the issue of the untimeliness of respondent's controversion appellant maintained that he timely filled out the TWCC-41 on August 19, 1991. He also referred to an exhibit he introduced which was asserted in argument to be three pages from descriptive literature on the 1989 Act obtained from the Commission's field office in (City), Texas. This exhibit cited CTS as an example of an occupational disease which an employee "must report to your employer within (sic) 30 days of the date you become aware that the disease is related to your employment." As we cited earlier, Article 8308-5.01(a) requires such notice "not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment." (Emphasis added.) Appellant also argued, though no evidence was adduced on the point, that Employer didn't send him the TWCC-1 form mentioned in the exhibit "to trigger him to fill out a TWCC-41 form." *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 120.2 (TWCC Rule 120.2) requiring the filing of the Employer's First Report of Injury Form TWCC-1. Appellant posited that since respondent didn't begin to pay benefits by the seventh day [November 28, 1991] after receiving written notice of injury [November 21, 1991], respondent didn't get the 60-day period to contest compensability. He reasoned that respondent's 60-day period to contest compensability could only be triggered by its first having initiated the payment of benefits seven days after receiving written notice of injury. Appellant cited the above-mentioned descriptive literature which stated "[I]f the insurance company begins paying for benefits, it still has 60 days from the date it received written notice of your injury to dispute your claim." Appellant argued that, since respondent did not commence payment of benefits seven days after it received Employer's written notice of injury on November 21st, respondent was not entitled to the 60-day period to contest compensability. This being the case, argued appellant, respondent's TWCC-21, dated 12/9/91, was untimely under Article 8308-5.21(b) since it was made more than seven days after respondent received Employer's First Notice.

As for the timeliness of appellant's notice of injury, it does appear that appellant's notice to Employer of his occupational disease was untimely because he became "aware" of his disease not later than (date of injury) but apparently didn't notify Employer before August 19th. *See* Article 8308-5.01 and TWCC Rule 122.1. However, as previously noted, such potential issue was not one of the two disputed issues formulated by the parties to the hearing. *See* Article 8308-6.31(a) and TWCC Rule 142.7.

As for the timeliness of respondent's contest of compensability, if appellant were correct that respondent did not timely contest the compensability of his occupational disease, then the remaining issue concerning the causation of the occupational disease would become moot. The hearing officer found that on or about November 26th the Employer filed its first report of injury, that respondent did not have notice of appellant's claim

before November 21st, and, that respondent mailed its contest of compensability on December 9th to appellant and the Commission. Based upon these findings the hearing officer concluded as a matter of law that respondent had "not waived its right to contest its liability for benefits under Article 8308-5.21(a)" because respondent sent its notice of contest of compensability within 60 days of its receiving Employer's notice on November 21st.

We agree with the hearing officer's conclusion. Article 8308-5.21(a) provides, *inter alia*, that "[I]f the insurance carrier does not contest the compensability of injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives it right to contest compensability . . . ." The evidence supports the hearing officer's determination that respondent did contest compensability within 60 days of receiving notice of the injury.

As appellant points out, Article 8308-5.21(b) does require the carrier to either begin the payment of benefits or notify the Commission and the employee of its refusal to pay not later than the seventh day after receiving written notice of the injury. *See* TWCC Rule 124.1 defining "written notice of injury" *and see* TWCC Rule 124.6, "Notice of Refused or Disputed Claim." The evidence shows that the respondent received written notice on November 21st and did not prepare its notice of refused claim until December 9th, a period which exceeded seven days but was well within 60 days. However, Article 8308-5.21(a) provides that if a carrier fails to either initiate payment or file a notice of refusal in a timely manner, *i.e.*, as required by Article 8308-5.21(b), then the carrier commits a
Class B administrative violation and each day of noncompliance constitutes a separate violation. Article 8308-10.22(2) provides penalties up to $5,000.00 for Class B administrative violations. We do not read Article 8308-5.21 to provide that a carrier's 60-day period to either contest compensability or suffer a waiver of its right to contest is dependent upon its first initiating payment of benefits. Article 8308-5.21 does provide that a carrier shall initiate compensation promptly. However, Class B administrative penalties, not waiver, are provided for by the statute should a carrier fail to either initiate payment or provide notice of refusal to pay not later than seven days after receiving written notice of injury. Also, if, as appellant contended in argument, Employer failed to timely file the TWCC-1 written report with the Commission and respondent as required by Article 8308-5.05(a), and to send appellant a copy as required by TWCC Rule 120.2(c), a Class D administrative violation may have been committed absent good cause. *See* Article 8308-5.05(e) and TWCC Rule 120.2(e).

Turning to the issue of the causation of appellant's CTS, we find sufficient evidence to support the hearing officer's conclusions that appellant failed to establish by a preponderance of the evidence that his CTS arose out of and during the course and scope of his employment and that he therefore did not suffer a compensable occupational disease. The hearing officer is the trier of fact in a contested case hearing and is designated by the 1989 Act as the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility it is to be given. Article 8308-6.34(e). As earlier noted, appellant was the sole testifying witness. However, the hearing officer

was not bound to accept appellant's testimony at face value. Long v. Knox, 155 Tex. 581, 291 S.W.2d 292, 297-298 (1956). The hearing officer was privileged to believe all or part or none of appellant's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). Similarly, the opinion evidence of medical experts is evidentiary and not binding upon the trier of fact, and such expert opinions are not conclusive even when they are uncontradicted by other medical evidence. Houston General Insurance Company v. Pegues, 514 S.W.2d 492, 494 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.). Appellant returned to Dr. K a second time to discuss the nature of his job duties in an effort to obtain an opinion from Dr. K that appellant's CTS was caused by the repetitive motions involved in his job. He was unsuccessful in his effort. In argument, appellant's representative contended that appellant simply did a poor job of communicating the specifics of his employment duties to Dr. K. Such argument was, of course, not evidence. We do not substitute our judgment for that of the hearing officer where, as here, his findings are supported by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). We find sufficient evidence to support the hearing officer's decision. His findings and conclusions were not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge